PP v Roslizam bin Abdul Azis & Anor

HIGH COURT (MUAR) — PERBICARAAN JENAYAH NO 45–23 OF 2000
JEFFREY J
19 APRIL 2004

Criminal Law — Dangerous Drugs Act (Malaysia) — s 39B — Trafficking in cannabis — Court presented with two different irreconcilable versions of overt acts of first accused — Whether ambiguity resolved in favour of accused — Whether prosecution made out clear case that first accused deposited bag containing cannabis in refrigerator — Whether prosecution made out prima facie case that first accused had custody and/or control of bag

Criminal Law — Penal Code — s 34 — Common intention — Act of trafficking committed at a house — Only first accused in — Second accused nowhere near house — No evidence that second accused participated in alleged act of trafficking — Whether any evidence of common intention

Criminal Procedure — Charge — Alteration or amendment — Trafficking in dangerous drug — Prosecution failed to make out prima facie case that first accused had custody and/or control of drugs in bag and rooms — Whether there was possession of cannabis contained in translucent bottle — Whether charge against first accused to be amended to one of possession of cannabis in translucent bottle

The two accused were jointly charged that they did on 31 July 1998 at about 3.15 am in a house at 30, Jalan Sri Sulong, Taman Sri Sulong, Batu Pahat, Johor ('the house') trafficking a dangerous drug, namely, 3,680.5g of cannabis and that by virtue thereof, committed an offence under s 39B of the Dangerous Drugs Act 1952 ('the Act'), read with s 34 of the Penal Code.

The raid was led by SP3 who divided his men into two parties. The first party, led by SP3 entered the house by the front door while the second party, led by SP6 guarded the back of the house. SP3 testified that he saw three Malay men inside the house, the accused, SP7 and SP8. According to SP6 and SP10 who were at the back of the house and who peered through the window louvers at or about the same time that the first group of police officers were heard knocking on the front door, the first accused ran from the front hall to the kitchen and there put a bag in the refrigerator. That bag was found to contain 1,604 g of cannabis.

A search of the hall was conducted in the presence of the first accused, SP7 and SP8. A translucent plastic bottle containing plant material was found on a table in the hall. The plant material was analysed and found to be 167.3 g of cannabis. Three slabs of plant material containing 2,180 g of cannabis were found in the second bedroom. A slab of plant material and 22 packets of plant material, containing 59.1g and 70.1g of cannabis were found in the third bedroom.

Held, convicting the first accused on the amended charge of possession and acquitting and discharging the second accused:

(1) At the close of the prosecution case, the trial court must subject the prosecution evidence to a maximum evaluation as formulated in *Public Prosecutor v Ong Cheng Heong* [1998] 6 MLJ 678 and *Public Prosecutor v Saare Hama* [2001] 4 MLJ 480. The prosecution need not prove its case beyond a reasonable doubt at the intermediate stage (see paras 15–16)). *Dalip Bhagwan Singh v Public Prosecutor* [1998] 1 MLJ 1; *Looi Kow Chai & Anor v Public Prosecutor* [2003] 2 MLJ 65 followed.

(2) Since common intention was an ingredient of the charge, the prosecution needed to establish that one accused committed the alleged act and the other participated in it in furtherance of a common intention. However, there must be some evidence of common intention. The alleged act of trafficking in the instant case was said to have been committed at 3.15 am on 31 July 1998, at the house. But at the stated time, the only persons in the house were the first accused, SP7 and SP8. The second accused was nowhere near the house at that time, for he had been arrested by the police hours earlier at Tanjong Agas, Muar. There was no evidence, whether direct or circumstantial, that the second accused participated in the alleged act of trafficking committed in the house. Hence, the alleged act of trafficking at 3.15 am on 31 July 1998, at the house could not have been directly committed by the second accused. In any event, there was no evidence of any common intention. The only evidence against the second accused, if it could be considered as such, was that he was also an occupier of the house but common occupation per se was not evidence of any element of participation, or of common intention. Therefore, the prosecution had not put forward any case of any sort against the second accused (see para 18).

(3) With respect to the case against the first accused, the court was presented with two different irreconcilable versions of the overt acts of the first accused during the police raid. On the one hand, it was the testimony of SP6 and SP10 that the first accused ran from the hall and deposited the bag in the refrigerator. The testimony from SP7 and SP8, on the other hand, was that the first accused did not step out of the hall, which would mean that the first accused could not have deposited the bag inside the refrigerator. This inconsistency should have been settled but was not when the prosecution closed its case (see para 19).

(4) The position in law was that any ambiguity and doubt must be resolved in favour of the accused. As such, it could not be held that the prosecution had made out a clear case that the first accused ran from the hall to the kitchen and there deposited the bag and its contents in the refrigerator. Accordingly, the prosecution did not make out a prima facie case that the first accused was in custody and/or control of the bag and its contents (see para s 20–22).

(5) With respect to the drugs found in the second and third bedrooms, there was no prima facie case that the first accused was in possession of those drugs. Both the accused were occupiers of the house but it was not established that the first accused was in physical control of the second or third bedroom. Both the bedrooms were not locked and there was a reasonable possibility of access by others. The first accused was an occupier, but given that there was at least one other occupier, it could not be held that the first accused had exclusive use of the second and/or third bedroom (see para 23).

(6) There was however a clear case of possession of the cannabis contained in the translucent bottle lying on top of the coffee table in the hall. The cannabis in the translucent bottle was in full view of the first accused and given that the cannabis smoked by SP7 and SP8 was provided by the first accused, it could be reasonably inferred that the first accused would have had the power to deal with the cannabis in the translucent bottle. Accordingly, the charge against the first accused was amended to one of possession of 167.3 g of cannabis, an offence punishable under s 39A(2) of the Act, to which the first accused pleaded guilty. The right and appropriate punishment for the amended offence was a term of imprisonment of nine years imprisonment, with effect from the date of arrest, and ten strokes of the rotan (see paras 23–24).

[**Bahasa Malaysia Summary**

Kedua-dua tertuduh ('OKT') telah dituduh bersama bahawa mereka telah para 31 Julai 1998 lebih kurang 3.15 pagi di dalam sebuah rumah di 30, Jalan Sri Sulong, Taman Sri Sulong, Batu Pahat, Johor ('rumah tersebut') mengedar dadah berbahaya, iaitu, 3,680.5g kanabis dan dengan itu, telah melakukan kesalahan di bawah s 39B Akta Dadah Berbahaya 1952 ('Akta tersebut'), dibaca bersama s 34 Kanun Kesiksaan.

Serbuan telah diketuai oleh SP3 yang telah membahagikan orang-orangnya kepada dua kumpulan. Kumpulan pertama, diketuai oleh SP3 telah masuk ke dalam rumah melalui pintu hadapan manakala kumpulan kedua, diketuai oleh SP6 telah mengawal belakang rumah tersebut. SP3 memberi keterangan bahawa dia melihat tiga lelaki melayu di dalam rumah tersebut, OKT, SP7 dan SP8. Menurut SP6 dan SP10 yang berada di belakang rumah dan yang mengamati melalui anak tingkap pada atau lebih kurang waktu yang sama kumpulan pertama pegawai-pegawai polis didengar mengetuk pintu hadapan, tertuduh pertama telah lari dari ruang tamu hadapan ke dapur dan telah meletakkan satu beg ke dalam peti sejuk. Beg tersebut didapati mengandungi 1,604g kanabis.

Penggeledahan di ruang tamu telah dijalankan di hadapan tertuduh pertama, SP7 dan SP8. Satu botol plastik yang telus yang mengandungi bahan tumbuhan dijumpai di atas meja di ruang tamu tersebut. Bahan tumbuhan itu telah dianalisa dan didapati adalah 167.3g kanabis. Tiga papak bahan tumbuhan mengandungi 2,180g kanabis telah dijumpai di bilik tidur kedua. Satu papak bahan tumbuhan dan 22 peket bahan tumbuhan, mengandungi 59.1g dan 70.1g kanabis telah dijumpai di bilik tidur ketiga.

Diputuskan, mensabitkan tertuduh pertama dengan pertuduhan pemilikan yang dipinda dan membebaskan dan melepaskan tertuduh kedua:

(1) Setelah kes pendakwaan ditutup, mahkamah berbicaraan mesti menilai keterangan pendakwaan kepada penilaian maksimum seperti yang dirumuskan di dalam *Public Prosecutor v Ong Cheng Heong* [1998] 6 MLJ 678 dan *Public Prosecutor v Saare Hama* [2001] 4 MLJ 480. Pendakwa tidak perlu membuktikan kesnya di luar keraguan munasabah di peringkat pertengahan (lihat perenggan 15–16). *Dalip Bhagwan Singh v Public Prosecutor* [1998] 1 MLJ 1; *Looi Kow Chai & Anor v Public Prosecutor* [2003] 2 MLJ 65 diikuti.

(2) Memandangkan niat bersama adalah satu kandungan daripada pertuduhan, pendakwa perlulah mewujudkan bahawa seorang tertuduh the melakukan perbuatan yang dituduh dan yang lain telah mengambil bahagian dalam melanjutkan niat bersama. Walau bagaimanapun, mestilah terdapat satu keterangan tentang niat bersama. Perbuatan pengedaran di dalam kes ini dikatakan telah dilakukan pada 3.15 pagi pada 31 Julai 1998, di rumah tersebut. Tetapi pada masa yang dikatakan itu, satu-satunya orang di dalam rumah tersebut adalah tertuduh pertama, SP7 dan SP8. Tertuduh kedua tiada berhampiran rumah tersebut pada masa itu, kerana dia telah ditangkap oleh polis beberapa jam awal di Tanjong Agas, Muar. Tidak terdapat keterangan, sama ada secara terus atau mengikut keadaan, bahawa tertuduh kedua mengambil bahagian di dalam perbuatan pengedaran yang dilakukan di dalam rumah tersebut. Oleh itu, perbuatan pengedaran yang dituduh pada 3.15 pagi pada 31 Julai 1998, di rumah tersebut tidak dilakukan secara lansung oleh tertuduh kedua. Dalam apa-apa keadaanpun, tiada keterangan sebarang niat bersama. Satu-satu keterangan terhadap tertuduh kedua, sekiranya boleh dikira, adalah bahawa dia juga merupakan penghuni rumah tersebut tetapi penghuni bersama per se bukanlah keterangan sebarang elemen penyertaan, atau niat bersama. Oleh itu, pendakwa tidak mengemukakan sebarang kes yang berkaitan terhadap tertuduh kedua (lihat perenggan 18).

(3) Berkenaan kes terhadap tertuduh pertama, dua versi yang bercanggahan berkaitan dengan perbuatan terang-terangan tertuduh pertama semasa sebuan polis telah dikemukan kepada mahkamah. Di satu bahagian, hanyalah testimoni SP6 dan SP10 bahawa tertuduh pertama lari daripada ruang tamu dan memasukkan beg di dalam peti sejuk. Testimoni SP7 dan SP8, di satu bahagian lagi, bahawa tertuduh pertama tidak keluar daripada ruang tamu, ertinya tertuduh pertama tidak memasukkan beg ke dalam peti sejuk. Percanggahan ini boleh diselesaikan tetapi tidak selepas kes pendakwaan ditutup (lihat perenggan 19)

(4) Kedudukan undang-undang adalah sebarang kesamaran dan keraguan mestilah diselesaikan dengan menyebelahi tertuduh. Oleh itu, tidak boleh diputuskan bahawa pendakwa telah memberikan kes yang jelas bahawa tertuduh pertama telah lari dari ruang tamu ke dapur dan di sana telah memasukkan beg dan kandungannya ke dalam peti sejuk. Oleh yang demikian, pendakwa tidak membuktikan kes prima facie bahawa tertuduh pertama mempunyai jagaan dan/atau kawalan terhadap beg dan kandungannya (lihat perenggan 20–22).

(5) Berkenaan dengan dadah yang dijumpai di dalam bilik tidur tertuduh kedua dan ketiga, tiada kes prima facie bahawa tertuduh pertama memiliki dadah tersebut. Kedua-dua tertuduh adalah penghuni rumah tersebut tetapi tidak dibuktikan bahawa tertuduh pertama mempunyai kawalan secara fizikal terhadap bilik tidur kedua dan ketiga. Kedua-dua bilik tidur tidak dikunci dan terdapat kemungkinan laluan oleh orang lain. Tertuduh pertama adalah penghuni, tetapi memandangkan terdapat juga penghuni yang lain, tidak boleh dikatakan bahawa tertuduh pertama mempunyai kegunaan yang eksklusif terhadap bilik kedua dan/atau ketiga (lihat perenggan 23)

(6) Di situ walau bagaimanapun, terdapat kes yang jelas berkenaan pemilikan kanabis yang terdapat di dalam botol yang telus yang berada di atas meja kopi di ruang tamu. Kanabis di dalam botol yang telus itu berada di dalam pandangan tertuduh pertama dan berdasarkan kanabis yang dihisap oleh SP7 dan SP8 telah disediakan oleh tertuduh pertama, tidak boleh disimpulkan secara berpatutan bahawa tertuduh pertama mempunyai kuasa untuk mengawal kanabis di dalam botol yang telus. Oleh yang demikian, pendakwaan terhadap tertuduh pertama telah ditukar kepada satu pemilikan 167.3g kanabis, kesalahan di bawah s 39A(2) Akta itu, di mana tertuduh pertama telah mengaku salah. Hukuman yang betul dan tepat untuk kesalahan yang dipinda adalah sembilan tahun penjara, bermula dari tarikh ditangkap, dan 10 kali sebatan (lihat perenggan 23–24).]

Notes

For cases on s 39B of the Dangerous Drugs Act, see 4 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 232, 235, 236

For cases on prima facie case, see 4 *Mallal's Digest* (4th Ed, 2004 Reissue) paras 2791–2793

For cases on common intention under s 34 of the Penal Code, see 4 *Mallal's Digest* (4th Ed 2003 Reissue) paras 1186–1188

For cases on alteration or amendment of charges, see 5(1) *Mallal's Digest* (4th Ed 2003 Reissue) paras 904–906

For alteration or amendment of charges, see 18 *Halsbury's Laws of Malaysia,* para [310.299]

For common intention, see 11 *Halsbury's Laws of Malaysia,* paras [190.013]–[190.055]

Cases referred to

Abdullah Zawawi bin Yusoff v Public Prosecutor [1993] 3 MLJ 1 (refd)
Chean Siong Guat v Public Prosecutor [1969] 2 MLJ 63 (refd)
Dalip Bhagwan Singh v Public Prosecutor [1998] 1 MLJ 1 (folld)
Lee Keng Guan & Ors v Public Prosecutor [1997] 2 MLJ 95 (refd)
Looi Kow Chai & Anor v Public Prosecutor [2003] 2 MLJ 65 (folld)
Mohan Singh a/l Lachman Singh v Public Prosecutor [2002] 3 MLJ 291 (refd)
Pang Chee Meng v Public Prosecutor [1992] 1 MLJ 137 (refd)
PP v Dato' Balwant Singh (No 1) [2002] 4 MLJ 427 (refd)
Public Prosecutor v Muhamad bin Chikuna [1993] MLJU 270 (refd)
Public Prosecutor v Ahmad Rashdan bin Shamsher [1994] MLJU 239 (refd)
Public Prosecutor v Datuk Hj Harun bin Idris (No 2) [1977] 1 MLJ 15 (refd)
Public Prosecutor v Lin Lian Chen [1991] 1 MLJ 316 (refd)
Public Prosecutor v Mohd Alias bin Mohd Kamis [1994] MLJU 248 (refd)
Ramli bin Sutu v Public Prosecutor [1998] MLJ 323 (refd)
Shamsuddin bin Hassan & Anor v Public Prosecutor [1991] 3 MLJ 314 (refd)

Legislation referred to

Criminal Procedure Code ss 34, 180(i)
Dangerous Drugs Act 1952 ss 2, 37D(a), 39A(2), 39B
Penal Code s 34

Lee Lay Choon DPP(AG's Chambers) for the prosecution
GF Nelson (GF Nelson & Co) for the first accused
Shahareen Begum Azmi (Imran, Shahareen & Co) for the second accused

Jeffrey J:

[1] The charge against both accused reads as follows:

> Bahawa kamu pada 31 Julai 1998 jam lebih kurang 3.15 pagi di rumah 30, Jalan Sri Sulong, Taman Sri Sulong, dalam daerah Batu Pahat, dalam Negeri Johor, telah

didapati mengedar dadah berbahaya iaitu 3,680.5 gram cannabis dan dengan itu kamu telah melakukan satu kesalahan di bawah Seksyen 39B Akta Dadah Berbahaya 1952 dan dibaca bersama Seksyen 34 Kanun Keseksaan.

[2] 11 witnesses testified for the prosecution; seven were from the Royal Malaysian Police, three (SP5, SP7 & SP8) were civilians, and one (SP4) was a government chemist.

[3] The narrative of the police witnesses at the scene was related by SP3, SP6, SP9, and SP10. Inspector Shamsul Farid bin Abdul Rani (SP3) testified as follows. Under cross-examination by Mr Nelson for the first accused, SP3 disagreed that the information he received came from the Muar police. On 31 July 1998, he was not aware that the second accused had been arrested on 30 July 1998. When he knocked on the door, he identified himself. Three of his men at that moment were already stationed at the back of the house. In his police report, he stated that the first accused and SP7 and SP8 attempted to escape – *'Mereka melarikan ke bahagian belakang rumah, ke bahagian dapur'*. SP3 disagreed with the counsel who suggested that the police broke down the front door. The first accused opened the front door with a key. He handed that key to SPll. There were three bedrooms. He searched all three bedrooms and the washroom/toilet. He did not count the number of toothbrushes in the washroom/toilet. SP3 agreed that it was his impression that several persons occupied the said house.

[4] Under cross-examination by Azmi Juewani who was then for the second accused, SP3 said that the second group led by SP6 entered the house about five minutes after him. All three bedrooms were not locked. When he peered through the window louvers, he saw the first accused, and SP7 and SP8 talking to one another. Under re-examination, SP3 said that there was more than one occupier in the house. He was still outside the house when he saw the first accused, SP7 and SP8 running towards the back portion of the house. The house key was not listed in the search list as he only listed the drug exhibits.

[5] Corporal Azman Mujid (SP9), who was in the first group, similarly testified that when he was outside the house he heard the sound of conversation coming from the house. SP3 knocked on the door and identified himself. He raised the window louvers. Three male Malays were in the guest hall. Those three persons attempted to escape — *'Saya nampak ketiga-tiga cuba melarikan diri'*. About five minutes later, one of them opened the door. It was the first accused who opened the door. The first group then entered the house and ordered the three persons inside the house not to move. SP3 ordered the second group to enter the house. The second group entered by way of the front door. SP6 informed SP3 that the first accused stashed something inside the refrigerator. SP3 searched the hall and took possession of a bottle lying

on the coffee table. Inside that bottle were numerous packets containing a plant material. SP3 then searched the first bedroom. Nothing incriminating was found in that room. SP3 searched the second bedroom. In that room, SP3 found a 'Singer' cardboard box. Inside that box were three slabs of a plant material. SP3 searched the third bedroom. In a clothing cupboard in that room, SP3 uncovered several packets containing a plant material. The kitchen was then searched. SP6 pointed out the refrigerator where the bag was stashed. SP3 opened the refrigerator and took out an 'Umbro' bag. SP3 unzipped the bag in the presence of the first accused and SP7 and SP8. Inside that bag were three slabs of a plant material. Nothing incriminating was further found in the house.

[6] Under cross-examination by Nelson, SP9 related that when he was outside the house he heard human voices but not the actual conversation. When the first group entered the house, there was light in the house, but he could not say if the light was from the hall or from the bedrooms. He was present during the search of the third bedroom. He could not say if there were ladies clothing in that cupboard. Under re-examination, SP9 said that there was light in the house. When he peered through the window louvers, it was dark (*samar-samar*) inside the house, but he could see what was going on inside the house — '*Ada anggota yang menyalakan lampu-lampu rumah yang belum di pasang*'.

[7] Two other police witnesses gave direct evidence that it was the first accused who stashed the black bag inside the refrigerator. The testimony of Sergeant Kamsan Sariak (SP6), from the point when the second group had taken their position at the back of the said house, was as follows. He heard knocking on the front door, and a voice saying '*Saya polis dari bahagian nakotik*'. He raised the window louvers to peer inside the house. He saw a male Malay running into the kitchen. That person deposited something black in colour into the refrigerator. *'Pada masa itu, dapur di cahayai oleh lampu dari ruang tetamu dan juga lampu dan peti sejuk. Saya dapat lihat wajar lelaki itu. Saya boleh cam lelaki itu.*' The first accused was the person who deposited the said article into the refrigerator. The first accused then ran back to the hall. No other person entered the kitchen. Later, SP3 called to him and the second party to enter the house by the front door. Once in the hall, he informed SP3 that someone (SP6 testified that he pointed out to SP3 that it was the first accused) entered the kitchen and put an article inside the refrigerator. When he was in the hall, he saw that the persons in the house were the first accused and two other persons (SP7 and SP8). '*Selepas memberitahu kepada Inspector Shamsul, saya melihat Inspektor Shamsul bawa OKT1 ke ruang dapur. Sebelum bawa OKT1 ke ruang dapur, Inspektor Shamsul tidak buat pemeriksaan di ruang tetamu.*' He did not follow along in the search of the bedrooms and kitchen, but he saw SP3 bringing out slabs of drugs from the bedrooms, and a black bag from the kitchen. In the hall, SP3

opened that bag in the presence of the first accused. SP3 found a few slabs of drugs,

[8] Under cross-examination by Nelson, SP6 testified as follows. It was the first accused who deposited an article into the refrigerator. The police report of SP3 did not state anything about an article being put into the refrigerator. The briefing by SP3 was given pursuant to prior information received by SP3. The area at the back of the house was lit by light from the house. SP6 could not say which light source lit the house. The windows louvers were not shut, and he peered through the louvers. He saw the facial features of the person who deposited the article into the refrigerator. At that stage of his cross-examination of SP6, Nelson for the first accused requested the first accused, SP7 and SP8 to stand side by side. SP6 then said that the height and build of the first accused, as opposed to that of SP7 and SP8 were very different, a fact also observed by the court. SP6 continued as follows. He could not describe the thing deposited into the refrigerator. His view of the person who deposited the thing into the refrigerator was not fleeting. '*Saya nampak selama lebih kurang 8 saat.*' He had a frontal view of that person when that person entered the kitchen. The refrigerator light lit up when that person opened the refrigerator door and from that light source he got a side view of that person. The refrigerator was located below the wall plug and not at the corner as shown in photograph P12(16). Under re-examination, SP6 maintained that he saw the first accused depositing a bag into the refrigerator. The house was lit by light from the rooms. He had a clear view of the first accused entering the kitchen and then depositing a bag into the refrigerator. The refrigerator was facing the position where he was standing.

[9] Detective Lance Corporal Jasmi Jurin (SP10), who was with SP9 at the back of the house, testified as follows. He raised the window louvers. He heard the voice of SP3 identifying himself as *'pegawai polis'*. He saw the first accused depositing a thing, black in colour, into the refrigerator (SP10 could not describe that thing). '*Pada ketika itu keadaan dapur adalah samar-samar, sebab lampu dapur tidak menyala. Cahaya berpandu ruang tetamu.*' When the refrigerator door was opened, the refrigerator light lit up, and he saw the facial features of the first accused. '*Selepas itu OKT1 terus beredar ke ruang tetamu. Selepas itu SP3 mengarahkan saya, SP6 dan Ibrahim masuk ke dalam rumah dan membuat kawalan keatas tiga tangkapan.*' Once inside the house, SP6 said something to SP3. '*3 tangkapan adalah OKT1, SP7 dan SP8.*' He did not join in the search of the house. Under cross-examination, SP10 said that he stood guard over the three arrested persons in the guest hall. He did not follow the others to the kitchen. He could not say if the first accused was present when SP3 discovered the thing inside the refrigerator. The refrigerator was located at one corner of the kitchen, as in photograph P12(16). SP10 disagreed with counsel who suggested

that he only saw the back of the person who placed the thing inside the refrigerator. He saw the right side of the face of that person. Under re-examination, SP10 testified that he was not sure whether SP3 ordered him to escort the first accused to the kitchen. The refrigerator was facing the position where he was standing.

[10] In short, two police witnesses testified that it was the first accused who secreted the Umbro bag and its contents in the refrigerator. But that narrative was not supported by the witnesses inside the said house. Elias bin Saidi (SP7) testified that he was arrested on 31 July 1998 whilst he was inside the said house together with the first accused and SP8. The occupiers of the said house were the first and second accused, both whom he knew from childhood. He and SP8 went to the said house on 31 July 1998 to smoke cannabis. They reached the said house at 1.00 am. The first accused opened the door for them. '*Saya duduk di ruang tetamu. Saya duduk berbuat-bual dan hadapan ada ganja. Kami bertiga menghisap ganja. Saya kurang pasti ganja itu kepunyaan siapa*'. At about 2.30 am, the police knocked on the door. '*Saya rasa panic.*' The first accused opened the door. The police entered the house. The police found slabs of drugs in the second bedroom. The police found a small quantity of cannabis in the hall. The drugs in the house did not belong to him. Before the arrival of the police, he had only been in the hall and not anywhere else. '*OKT1 dan SP8 juga berada di ruang tetamu sahaja. Mereka tidak pergi ke tempat lain dalam rumah.*'

[11] Under cross-examination by Nelson, SP7 said that he went to the said house on a motorcycle. After some conversation, he started to smoke cannabis. He could not remember for how long he was smoking before the arrival of the police. He could not remember the number of times he had been to the said house. He did not reside in the house. SP7 was then asked to identify six items of clothing [ID20(l-6)] produced by Nelson; SP7 said that one item belonged to him. SP3 related that all three persons who were arrested (first accused, SP7 and SP8) were charged for drug trafficking, but later he and SP8 were released. SP7 agreed with counsel who suggested that he still harboured apprehension that in the future he would be charged. The police did not break down the door. Under cross-examination by Azmi, SP7 said that he did not know the owner of the house, and that he had not seen any Chinese lady inside the said house. SP7 was not re-examined.

[12] Mohd Esa Abd Jalil (SP8) testified that he went to the said house, on 31 July 1998, together with SP7. The said house was rented by the first accused and second accused. '*Saya memperkenalkan OKT1 sebab saya sekampung dengan OKT1. Sebelum kejadian saya kenal OKT2 selama satu tahun.*' Two or three times in a week he would go to the said house. '*Saya pergi jumpa OKT1 dan juga mengambil*

dan menghisap ganja.' After he and SP7 had arrived at the house on 31 July 1998, '*Kami bertiga ... ada menghisap ganja di ruang tetamu*.' At about 2 or 3am, he heard the sound of the police raid – '*Saya ada dengar rumah diserbu oleh polis. Saya cuma bangun, dan OKT1 membuka pintu. Saya kata saya cuma bangun sebab sebelum polis serbu saya sedang terlena*.' The first accused opened the door. The police ransacked the house. The police uncovered cannabis in the second bedroom and in the refrigerator. He could not remember the other places where cannabis was also uncovered. He did not bring any cannabis to the house. The cannabis he smoked was that in the house, that below the coffee table in the hall. He did not know how it came to be that there was cannabis below the coffee table. He took (*mengambil*) cannabis from the first accused. '*Saya tak pasti siapa yang bekalkan ganja di ruang tetamu. Saya tidak tahu samada SP7 ada membawa ganja ke rumah no. 30*.' The cannabis in the house did not belong to him. He did not put any cannabis inside the refrigerator. He did not know who put cannabis in the refrigerator. About five minutes after the police had knocked, the first accused opened the door.

[13] Under cross-examination by Nelson, SP8 said that he was not related to the first accused. He occasionally visited the said house. He had passed the night before in the said house. He had not left any of his clothing behind in the house. ID20(l–4) belonged to him. The second bedroom was not locked. There was another occupier of the said house, who worked in Singapore. He had occasion to meet him for a short while. He and SP7 were also charged, but later were released. The first accused opened the door after about one or two minutes. The police did not break down the door. He did not hear the police identifying themselves at the door as he was asleep (*terlena*) at that moment. Under cross-examination by Azmi, SP8 said that he cleansed ID20(l–4) in the said house before 31 July 1998. He had wore ID20(l–4) in the said house. Under re-examination, SP8 explained that he testified that there were other occupiers of the house as the first and second accused had told him that it was so. He had no personal knowledge of that fact. '*Saya pernah jumpa dia* [other occupier] *sekali sahaja dan sekejab sahaja semasa berselisih*.' He could not be sure as to the length of time that the first accused took to open the door. '*Sebab pada masa itu saya dan kami bertiga dalam keadaan kelam-kabut. Saya anggap OKT1 mengambil lebih kurang lima minit untuk membuka pintu hadapan*.'

[14] Section 180(i) of the Criminal Procedure Code provides that 'when the case for the prosecution is concluded, the court shall consider whether the prosecution has made out a prima facie case against the accused'. In *Looi Kow Chai & Anor v Public Prosecutor* [2003] 2 MLJ 65, the Court of Appeal thus set out the meaning of 'prima facie case' and the approach to be adopted by a trial court at the close of the prosecution case:

In *Public Prosecutor v Dato' Seri Anwar bin Ibrahim (No 3)* [1999] 2 MLJ 1 at p 63, Augustine Paul J made the following observation which has since received approval *sub silentio* from the Federal Court (see [2002] 3 MLJ 193):

> A prima facie case arises when the evidence in favor of a party is sufficiently strong for the opposing party to be called on to answer. The evidence adduced must be such that it can be overthrown only by rebutting evidence by the other side. Taken in its totality, the force of the evidence must be such that, if unrebutted, it is sufficient to induce the court to believe in the existence of the facts stated in the charge or to consider its existence so probable that a prudent man ought to act upon the supposition that those facts existed or did happen. As this exercise cannot be postponed to the end of the trial, a maximum evaluation of the credibility of witnesses must be done at the close of the case for the prosecution before the court can rule that a prima facie case has been made out in order to call for the defence.

In our judgment, the foregoing passage correctly states the law as it presently stands. But, we would emphasize and make it amply clear that there is no burden on the prosecution to prove its case beyond a reasonable doubt at the close of the prosecution's case. Whether it has done so, is a question that must be dealt with at the close of the whole case.

In *Public Prosecutor v Ong Cheng Heong* [1998] 6 MLJ 678 at p 691, Vincent Ng J expressed his view on the amendment to section:

> Thus, to me, maximum evaluation simply means evaluation, on a prima facie basis, of each and every essential ingredient of the charge as tested in cross-examination. In other words, maximum evaluation connotes quantitative rather than qualitative evaluation of the evidence; with focus more on the evidential burden in terms of evidence led rather than the persuasive burden in terms of qualitative degree of proof. What then constitutes a 'prima facie case'? 'Prima facie' means on the face of it or at first glance. To me, in the light of Act A979, perhaps the most appropriate definition of a 'prima facie case' could be found in the Oxford Companion of Law (p 987) which has it as:
>
> > A case which is sufficient to call for an answer. While prima facie evidence is evidence which is sufficient to establish a fact in the absence of any evidence to the contrary, but is not conclusive. It would follow that there should be credible evidence on each and every essential ingredient of the offence. Credible evidence is evidence which has been filtered and which has gone through the process of evaluation. Any evidence which is not safe to be acted upon should be rejected.

The same learned judge in *Public Prosecutor v Saare Hama & Anor* [2001] 4 MLJ 480 at p 491 said: In my view the prosecution could be ruled to have made out a prima facie case against the accused when the probative force of the evidence on all the

essential elements in the charge taken as a whole is such that, if unrebutted, it is sufficient to induce the court to believe in the existence of the facts pertaining to such essential elements or to consider its existence so probable that a prudent man ought to act upon the supposition that those facts existed or did happen. It is therefore wrong for a judge or magistrate to require the prosecution to prove that the accused is actually guilty beyond a reasonable doubt before calling for his defence. That requirement for ultimate decision must be postponed until the end of the trial, and to reiterate, there is no duty cast on the prosecution to actually prove their case beyond reasonable doubt as to the guilt of the accused at the close of the case for the prosecution. In substance, this is what Gordon Smith AG JA held in *PP v Chin Yoke* [1940] MLJ 47:

> Although we might have expressed the test in different words, we agree with the formulation of the test in *Ong Cheng Heong* and *Saare Hama*, In our judgment, these two cases accurately set out the approach that is to be adopted under s 173(f) and 180 of the Criminal Procedure Code at the conclusion of the prosecution's case.

Lastly, in *Public Prosecutor v Mohan Singh* [1999] 4 CD 620; *Pendakwa Raya v Mohan Singh a [sol] I Lachman Singh* [1999] MUD 218, Wahab Patail J expressed his view upon the approach to be taken by a court when deciding whether the prosecution had made out a case under s 180 of the Criminal Procedure Code. He said:

> I conclude then that the prosecution must be in a position to say:
>
> (a) at the end of the prosecution's case, that on the basis of the evidence it has advanced, and tested by cross-examination, it has advanced evidence beyond reasonable doubt in respect of all the elements of the charge; and
>
> (b) at the end of the trial, and based upon an evaluation of the whole of the evidence, that the defence has not raised any reasonable doubts by the evidence that the latter has adduced. Keeping in mind that in the event of ambiguity the beneficial interpretation is given in favour of the accused, the 'beyond reasonable doubt' test is therefore applied in assessing the evidence for the purpose of determining whether the prosecution has made out a prima facie case. It goes without saying that an evaluation of whether the prosecution has discharged the burden of proof beyond reasonable doubt requires a full or maximum evaluation of the evidence in the sense of evaluating the evidence before the court thoroughly.

If this passage is meant to suggest that the evidence led by the prosecution must receive maximum evaluation, then we would agree with it. But if what is meant is that a court ought to go further and determine whether the prosecution at the end of its case has proved the case against the accused beyond a reasonable doubt, then we find ourselves in disagreement with the learned judge in that case. In our view, subjecting the evidence of the prosecution to maximum evaluation to determine if the defence is to be called does not mean that the prosecution has to prove its case beyond a reasonable doubt at this intermediate stage.

[15] The pronouncement by the Court of Appeal in *Looi Kow Chai* was that at the close of the prosecution case the trial court must subject the prosecution' evidence to a maximum evaluation, albeit a maximum evaluation as formulated in *Ong Cheng Heong* and *Saare Hama*. The other pronouncement by the Court of Appeal in *Looi Kow Chai* was that the prosecution need not prove its case beyond a reasonable doubt at the intermediate stage, which accorded with the view of the Federal Court in *Dalip Bhagwan Singh v Public Prosecutor* [1998] 1 MLJ 1 at 16 that to prove a charge beyond a reasonable doubt at the end of the prosecution case (the pre 31 January 1997 position) is a heavier burden than to prove a prima facie case at the end of the prosecution case (the post 31 January 1997 position).

[16] The charge is that both accused were trafficking in cannabis, a dangerous drug. The first ingredient of the offence is trafficking (*Public Prosecutor v Ahmad Rashdan bin Shamsher* [1994] MLJU 239). Trafficking is defined in s 2 of the Act to include 'the doing of any of the following acts, that is to say, manufacturing, importing, exporting, keeping, concealing, buying, selling, giving, receiving, storing, administering, transporting, carrying, sending, delivering, procuring, supplying, or distributing any dangerous drug.' Trafficking may be presumed when certain primary facts are proved. Section 37(da) of the Act provides 'any person who is found in possession of 200 g or more in weight of cannabis otherwise than in accordance with the authority of this act or any other written law, shall be presumed, until the contrary is proved, to be trafficking in the said drug'. In either case, proof is essential, and the onus of proving everything essential to the establishment of the charge lies, but of course, on the prosecution. The onus is upon the prosecution to establish a prima facie case in the first instance (*Public Prosecutor v Datuk Hj Harun bin Idris (No 2)* [1977] 1 MLJ 15), before the court can call upon an accused to enter on his defence.

[17] The charge is also that the alleged offence was committed in furtherance of a common intention under s 34 of the Penal Code (FMS Cap 45). Since common intention is an ingredient of the charge, the prosecution need only to establish that one accused committed the alleged act and the other participated in it in furtherance of a common intention; but there must be some evidence of common intention *Shamsuddin bin Hassan & Anor v Public Prosecutor* [1991] 3 MLJ 314). The alleged act of trafficking in the instant case is said to have been committed at 3.15 am on 31 July 1998, at house number 30, Jalan Sri Sulong, Taman Sri Sulong, in the district of Batu Pahat. But at the stated time, the only persons in the house were the first accused, SP7 and SP8. The second accused was then nowhere near the said house, for he had been arrested hours earlier, at 7pm on 30 July 1998, and at a place far removed, at Tanjong Agas, Muar, by the police. Hence, the alleged act of trafficking at 3.15 am on 31 July 1998,

at house no 30, Jalan Sri Sulong, Taman Sri Sulong, could not have been directly committed by the second accused. Any case against the second accused could only be on the basis that the second accused participated in the alleged act of trafficking in furtherance of a common intention, and or that the said alleged act was done by the first accused in furtherance of the common intention of both the first and second accused. But there is not an iota of evidence, be it direct or circumstantial, that the second accused participated in the alleged act of trafficking committed in the said house. There is not an iota of evidence of an overt or covert act on the part of the second accused that could be viewed as an element of participation on the part of the second accused. In any event, there is not an iota of evidence of any common intention. The only evidence against the second accused, if it could be considered as such, is that he was also an occupier of the said house. But common occupation *per se* is not any evidence of any element of participation, or of common intention. Common occupation alone is not any evidence sufficient to infer any common intention or participation in the alleged act. In a word, the prosecution had not put forward any case of any sort against the second accused. There is positively no case against the second accused.

[18] With respect to the case against the first accused, the court was presented with two different irreconcilable versions of the overt acts of the first accused during the police raid. And it was not a case of mere discrepancies in the testimony of various witnesses who described the same act in different ways (see *Chean Siong Guat v Public Prosecutor* [1969] 2 MLJ 63). According to SP6 and SP10 who were at the back of the house and who peered through the window louvers at or about the same time that the first group of police officers were heard knocking on the front door, the first accused ran from the front hall to the kitchen and there secreted the Umbro bag in the refrigerator. That bag contained 1,604 g of cannabis. Hence, it was the clear testimony of SP6 and SP10 that the first accused had physical custody and or control over the Umbro bag and its contents of 1,604 g of cannabis. The simple fact of the matter is that without custody and or control the first accused could not have had his hands on the Umbro bag and its contents. And given the stated circumstances, where the bag was put in the refrigerator at about the time that the police were at the front door, it must reasonably appear that the first accused would have had guilty knowledge of the contents inside the bag and that the bag and its contents were hurriedly secreted to avoid detection. If indeed the first accused had deposited the Umbro bag and its contents into the refrigerator, then there is clear evidence of custody or control and also of knowledge on the part of the first accused.

[19] But there is also the unambiguous evidence, fascinatingly also from the prosecution, that the first accused had not stepped out of the hall, which

would mean that the first accused could not have secreted the bag and its contents inside the refrigerator. The testimony of SP6 and SP10 was that the first accused ran from the hall to the kitchen and there secreted the Umbro bag inside the refrigerator in the kitchen. If that were the case, then it would have to be at some point in time after SP3 had knocked on the front door. It could not been at any other time before. As a matter of fact, it was the testimony of SP3 that when he was at the front door he heard the sound of conversation coming from the house, and that when he peered through the window louvers he saw the first accused, SP7 and SP8 talking in the hall. According to SP3, it was only after he had knocked on the front door and identified himself that he heard the sound of person/persons running, SP9 corroborated that sequence of events. SP9 testified that when he was outside the house he heard the sound of conversation coming from the house, and that when he raised the window louvers after SP3 had knocked on the door, he (SP9) saw the first accused, SP7 and SP8 in the hall. According to SP9, the first accused, SP7 and SP8 attempted to escape – *'Saya nampak ketiga-tiga cuba melarikan diri'*. The point is that the first accused, SP7 and SP8 were together in the hall, and that SP7 and SP8 should be able to confirm and or at least not contradict the alleged fact that the first accused ran from the hall after the arrival of the police, if indeed the first accused had run from the hall to the kitchen as said by SPG and SP10. But the effect of the testimony of SP7 and SP8 was that the first accused remained throughout in the hall. SP7 testified that the police knocked on the door, that he panicked (*'Saya rasa panik'*), and that the first accused opened the door. According to SP7, that was the only overt act of the first accused after the arrival of the police. There was no evidence from SP7 that the first accused had moved out of the hall. The unmistakable drift of the testimony of SP7 was that the first accused remained throughout in the hall; SP7 testified that he was in the hall before the arrival of the police and that the others had not moved out of the hall (*'OKT1 dan SP8 juga berada di ruang tetamu sahaja. Mereka tidak pergi ke tempat lain dalam rumah'*). In any case, there was no evidence from SP7 that the first accused ran from the hall after the arrival of the police. According to SP8, at about 2 or 3 am he heard the sound of the police raid, he tried to get up, and the first accused opened the front door (*'Saya cuba bangun, dan OKT1 membuka pintu. Saya kata saya cuba bangun sebab sebelum polis serbu says sedang terlena'*). Again there was no evidence from SP8 that the first accused ran from the hall. Hence, there was no evidence from either SP7 or SP8 who were with the first accused in the hall that the first accused ran from the hall after the arrival of the police. Going by the testimony of SP7 and SP8, there was no such overt act on the part of the first accused. But of course, going by the testimony of SPG and SP10, the first accused ran from the hall to the kitchen and there secreted the Umbro bag. Nevertheless, it remains that the prosecution had presented two different irreconcilable versions with regard to the overt acts of the first

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accused. On the one hand, it was the testimony of SP6 and SP10 that the first accused ran from the hall, while on the other hand there was no testimony from SP7 and SP8 that the first accused ran from the hall. But that absence of testimony by SP7 and SP8 had left a gap in the evidence and raised a serious doubt as to whether the first accused had indeed ran from the hall. Perhaps it could be argued that SP7 and SP8 had no wish to implicate their friend, and therefore had glossed over the facts. That might have been the case. And perhaps it could be argued that reliance should be placed on the testimony of SP6 and SP10, as it was only them who saw the first accused depositing the Umbro bag into the refrigerator, while SP7 and SP8 who said that they remained throughout in the hall would not have witnessed the act of the first accused in the kitchen. But SP7 and or SP8 who said that they remained throughout in the hall would know if the first accused had run from the hall after the arrival of the police. In spite of that, the prosecution failed to adduce any testimony from SP7 and SP8 with respect to the alleged fact that the first accused ran from the hall. SP7 or SP8 was not even asked if the first accused were always with them in the hall. And by not doing so, going by the testimony of SP7 and SP8, the prosecution had presented a case that the alleged act — the first accused ran from the hall — did not happen at all. Meanwhile, through SPG and SP10, the prosecution also presented a case that the first accused ran from the hall to the kitchen. But it could not be both at the same time. Either the first accused ran or had not run from the hall. That should have been settled but was not when the prosecution closed its case.

[20] In *Mohan Singh a/l Lachman Singh v Public Prosecutor* [2002] 3 MLJ 291, the Court of Appeal per Gopal Sri Ram JCA said:

> The burden of proving its case at every stage lies on the prosecution. The only task of the accused is to raise a reasonable doubt as to the truth of the prosecution's case. If there are gaps in the case for the prosecution, these cannot be filled by resorting to a purported failure on the part of the defence to put specific questions relevant to its case. Such gaps must be filled by the prosecution itself: *Abdullah Zawawi bin Yusoff v Public Prosecutor* [1993] 3 MLJ 1. That has always been the law. It is still the law'.

[21] In the instant case, the gap in the evidence resulted in two different irreconcilable versions (i) that the first accused ran from the hall to the kitchen and there secreted the Umbro bag and (ii) that the first accused remained throughout in the hall. Let it be said in passing that different versions only weaken the prosecution's case (see *Public Prosecutor v Mohd Alias bin Mohd Kamis* [1994] MLJU 248), and conflicting versions would even warrant an acquittal (*Lee Keng Guan & Ors v Public Prosecutor* [1997] 2 MLJ 95). The position in law is that 'ambiguity must be resolved in favour of the accused' (*Ramli bin Sutu v Public Prosecutor* [1998] MLJ 323 per Tee Ah Seng J), and doubt must be

resolved in favour of the accused (see *Public Prosecutor v Mohd Alias bin Mohd Kamis* [1994] MLJU 248 per Abdul Malik Ishak J; *Public Prosecutor v Muhamad bin Chikuna* [1993] MLJU 270; *PP v Dato' Balwant Singh (No 1)* [2002] 4 MLJ 427). The defence is even entitled to the benefit of any doubt created even by the prosecution itself (*Public Prosecutor v Lin Lian Chen* [1991] 1 MLJ 316). Hence, it is not possible to resolve the said two irreconcilable versions in favour of the prosecution. One of those two irreconcilable versions is that the first accused remained throughout in the hall. In the presence of that latter co existing version, it could not be held that the prosecution had made out a clear case that the first accused ran from the hall to the kitchen and there secreted the Umbro bag and its contents in the refrigerator. The prosecution had not made out a prima facie case that the first accused was in custody and or control of the Umbro bag and its contents.

[22] With respect to the drugs found in the second and third bedrooms, there is no prima facie case that the first accused was in possession of those drugs. It was given in evidence that both accused were occupiers of the said house. But it was not established that the first accused was in physical control, be it exclusive to the first accused or shared with the second accused, of the second and/or third bedroom. Both the second and third bedrooms were not locked. There is a reasonable possibility of access by others. The onus was on the prosecution to exclude the possibility of access by others (see *Abdullah Zawawi bin Yusoff v Public Prosecutor* [1993] 3 MLJ 1). But that possibility of access by others and as well as the first accused's loss of exclusive use of the second and/or third bedroom, was not excluded by the evidence. The first accused was an occupier, but given that there was at least one other occupier, it would not be held that the first accused had exclusive use of the second and/or third bedroom (see *Pang Chee Meng v Public Prosecutor* [1992] 1 MLJ 137, where it was held by Abdul Hamid bin Haji Omar LP that the trial judge was wrong in holding that the accused had exclusive possession when there were others sharing the house) for to deduce and or to infer that the first accused was in custody or control or possession of the drugs found in those two bedrooms.

[23] There is however a clear case of possession of the cannabis contained in the translucent bottle lying on top of the coffee table in the hall. In the circumstances under which those cannabis were found, what with the cannabis in the translucent bottle in full view of the first accused who was in close proximity, and given that the cannabis smoked by SP7 and SP8 were provided by the first accused, it could be reasonably inferred that the first accused would have had the power to deal with the cannabis in the translucent bottle. It was the unchallenged evidence of SP4 that the cannabis in the translucent bottle weighed a total of 167.3 g. The charge against the first accused was accordingly amended to one of possession of 167.3 g of cannabis, an offence punishable under s 39A(2) of the Dangerous Drugs Act 1952. Unhesitatingly,

the first accused pleaded guilty to the amended charge. In the opinion of the court, the right and appropriate punishment for that admitted offence is a term of imprisonment of nine years imprisonment (with effect from the date of arrest) and 10 strokes of the rotan. The first accused is therefore ordered to suffer that punishment. As for the second accused, he is acquitted and discharged.

First accused sentenced accordingly. Second accused acquitted and discharged.

Reported by Lim Lee Na